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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

LIGHTS OF AMERICA, INC., Plaintiff and Appellant, v. CONSUMERS UNION OF UNITED STATES, INC., Defendant and Respondent.	B149187 (Super. Ct. No. KC033419)

APPEAL from an order of the Superior Court of Los Angeles County. Andria Richey, Judge. Affirmed.

Hari S. Lal & Associates, Hari S. Lal, John Noble and Atul Kumar for Plaintiff and Appellant.

Gaims, Weil, West & Epstein, Corey E. Klein; Pollet & Felleman and Michael N. Pollet for Defendant and Respondent.

Lights of America, Inc., a distributor of fluorescent lighting products, brought this libel action against Consumers Union of United States, Inc. after the latter published an article in *Consumer Reports* recommending consumers "avoid" certain lightbulbs from Lights of America. The trial court sustained Consumers Union's demurrer to the complaint without leave to amend on several grounds, including the statements in the article (1) are protected by the First Amendment, (2) are not defamatory and (3) are protected opinions. We affirm.

FACTS AND PROCEEDINGS BELOW

Lights of America, Inc.'s ("LOA") complaint against Consumers Union of United States, Inc. ("CU") alleges as follows:

LOA is a "packager and distributor of compact fluorescent lightbulbs." It sells more than 50 different models of bulbs. LOA prints information about its lightbulbs' "rated life" and "light output" on its product packaging.

The rated life of a lightbulb is measured by "the average time it takes the [bulb] to burn out." To test the rated life of its lightbulbs, LOA uses testing protocol IES LM-65-1991 developed by the Illuminating Engineering Society of North America ("IESNA"). Using this protocol, the tester leaves a lightbulb on for three hours, turns it off for 20 minutes and repeats this cycle until the bulb burns out. LOA derives the rated life information it prints on its product packaging from testing using the ISENA protocol. LOA acknowledges "no true industry standard method of testing [rated life] has been universally accepted." The ISENA protocol, however, "is used by virtually every compact fluorescent lightbulb manufacturer."

Light output is the amount of "actual light . . . coming from the" lightbulb. It is measured in lumens. LOA identifies on its product packaging which "traditional" incandescent lightbulbs are comparable to its compact fluorescent lightbulbs in terms of light output. Two seemingly identical incandescent lightbulbs could vary in terms of "lumen output" because "there is no standard lumen output from an

incandescent lightbulb." Therefore, "testers have created a range of lumens in which a bulb may fall in order to be considered in proper working order." LOA compares its compact fluorescent lightbulbs to those incandescent bulbs which fall within a certain "lumen range." LOA acknowledges "[t]here is no industry standard for measuring the output of a [sic] incandescent bulb and a compact fluorescent lightbulb for purpose of comparison." The method LOA uses, however, "is the standard that every other compact fluorescent lightbulb manufacturer" uses to compare its bulbs to incandescent lightbulbs.

CU publishes the magazine *Consumer Reports*, which provides the public with information about consumer goods and services. On or about December 23, 1998, CU published an article in the January 1999 issue of *Consumer Reports* entitled "Compact Fluorescents Come of Age." [1] In the article, CU made recommendations about certain compact fluorescent lightbulbs from General Electric, Osram Sylvania, Philips and LOA. The article references six different models of lightbulbs from LOA.

The article comments on the lightbulbs' rated life, stating "[t]ests performed by the independent Lighting Research Center at Rensselaer Polytechnic Institute in Troy, N.Y. ["LRC"], show that compact fluorescent bulbs from GE, Osram Sylvania, and Philips met or exceeded their rated life of 10,000 hours, no matter how often they were switched on and off. Bulbs from Lights of America consistently fell far short of their rated life. See the table at right." The table indicates LRC "life-tested" two of the six LOA models listed in the table and both models "[d]id not meet rated life in LRC tests." The article explains LRC "life-tested" two models of each brand in the following five ways: "5 minutes on, 5 minutes off; 15 minutes on, 5 minutes off; 1 hour on, 5 minutes off; 3 hours on, 5 minutes off; and 3 hours on, 20 minutes off."

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[1] The article is attached to LOA's complaint and incorporated therein by reference.

The article also comments on the bulbs' light output, stating "[a] panel of staffers characterized the light from several compact fluorescents that claim to equal a 100-watt incandescent. With the lights side by side, panelists considered the *Osram Sylvania CF30EL/C/830/MED/6* very bright and pleasing, and the *Lights of America 2127* less pleasing and fairly dim." The article also states: "Package claims are accurate – mostly. Most of the bulbs we tested, except the *Lights of America*, achieved the light output stated on the packaging more often than not. The *Lights of America 2127*, which purports to equal a 100-watt incandescent, was more like a 65-watter. Another *Lights of America* bulb, which claims to be like a 150-watt incandescent, was comparable to a 110-watt bulb." The results of the light output tests on five bulbs from LOA and other bulbs from General Electric, Osram Sylvania and Philips are listed in the table. Also listed are the companies' "claimed [incandescent] equivalent[s]" for the fluorescent bulbs.

At the end of the article, CU concluded: "We recommend that you stick with bulbs from General Electric, Osram Sylvania, and Philips. Avoid bulbs from Lights of America; in our experience, they don't provide as much light, nor do they last as long as the package claims."

On or about December 23, 1998, The Home Depot, one of LOA's customers, sent a letter to LOA referencing the article in *Consumer Reports*.[2] The letter states, in pertinent part: "I have included a copy of the consumer reports article of [sic] compact fluorescent light bulbs for your review. This represents a potentially major problem. Your product is listed as the only manufacturer under the 'Not recommended' list. . . . [¶] The potential problem that arises is that customers and store associates rely on us to carry a quality product. Since we carry these models in our stores[,] customers (and our associates) may get a negative impression. Since LOA product was listed as 'NOT RECOMMENDED', the entire LOA category

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[2] The letter is attached to LOA's complaint and incorporated therein by reference.

may be perceived as a less than quality product. . . . [¶] I am currently having your product tested with our independent lab and should be able to have the data back within the month. Pending the outcome of the testing, I am recommending that all divisions watch movement and listen to the stores for any additional feedback. I would also like to have a response from your company as to why your product failed the testing that Rensselaer completed. I would also like to know what LOA intends on doing to counter these quality claims."

LOA's complaint asserts causes of action for trade libel and libel. LOA alleges CU's "statements falsely indicated that LOA's goods failed to live-up to the claims made on its packaging and further stated that consumers should 'avoid bulbs from Lights of America.' This statement was interpreted by the public as meaning that the entire line of LOA products was inferior to its competitors, rather than just the six (6) bulbs that were tested in the article." LOA also alleges CU's statements the bulbs were "fairly dim" and "consistently fell short of their rated life" are false. LOA states "[b]ased upon the inherent defects regarding the testing procedures, these statements were patently false." LOA alleges "the testing used in the article was not based on industry standard testing methods, procedures or protocols, nor was testing done in the same manner in which LOA and other manufacturers had used to develop the claims made about their products."

On or about January 8, 1999, LOA demanded CU retract the article. "LOA specifically requested a retraction stating that the tests performed failed to use industry testing procedures, and as a result, the testing that was performed on LOA's products was false and inaccurate. LOA further requested a retraction that the article was not meant to apply to all LOA products, but only the six (6) that were tested." LOA asked CU to remove all copies of the issue of *Consumer Reports* "from its vendors' shelves" and publish the retraction immediately.

On or about January 21, 1999, CU "agreed to publish a 'clarification'" of the article, which states LRC's test results pertain only to the six lightbulbs tested and not to LOA's entire product line. CU told LOA the earliest it could publish the

clarification was March 1999. LOA alleges "[t]he clarification did not address the failure to adhere to industry testing protocol which resulted in inaccurate and false testing results of LOA's products." Therefore, "LOA advised [CU] that the terms of the clarification were not acceptable and would simply cause more damage to LOA, since it would simply re-publish the previous false testing results." CU published the clarification.[3]

LOA alleges CU's article "disparaged LOA's business goods" and "was understood by those who saw and heard it in a way which defamed LOA." Those who read "the article were led to understand that LOA produced inferior or substandard products that should not be purchased." LOA alleges it has "lost several existing orders with major vendors, merchants and utilities as a direct result of this article" and "has further sustained irreparable injury to its reputation in the compact fluorescent lighting industry."[4] LOA also alleges "prospective customers have been deterred from buying LOA's business goods and from otherwise dealing with LOA."

LOA alleges CU published the article knowing the statements in it were false or with reckless disregard for whether the statements were true. LOA bases this allegation on (1) the fact CU did not indicate the statement "[a]void bulbs from Lights of America" refers only to the six models of lightbulbs tested and (2) CU "failed to indicate to readers that the testing used in the article was not based on industry standard testing methods, procedures or protocols, nor was testing done in the same manner in which LOA and other manufacturers had used to develop the claims made about their products." LOA seeks an award of exemplary and punitive damages.[5]

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[3] LOA did not attach the clarification to its complaint.

[4] The only "lost" customer LOA references by name is The Home Depot.

[5] LOA also sued I & I Group, "an authorized distributor for LOA," and Inder Sharma, an officer of I & I Group, alleging these defendants republished the contents of CU's article. I & I Group and Sharma are not parties to this appeal.

CU demurred to LOA's complaint. The trial court sustained the demurrer without leave to amend on the following grounds stated in the demurrer: (1) the statements in the article are protected by the First Amendment, (2) the statements are not defamatory, (3) LOA cannot state a claim for defamation or disparagement by omission and (4) CU's recommendations are protected opinions.

DISCUSSION

I. STANDARD OF REVIEW

In reviewing an order sustaining a demurrer, we accept as true the properly pleaded factual allegations of the complaint and consider matters which may be judicially noticed.[6] The allegations of the complaint must be liberally construed with a view to attaining substantial justice among the parties.[7] We review the complaint de novo to determine whether the trial court erred in sustaining the demurrer.[8]

When a trial court sustains a demurrer *without leave to amend*, "we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff."[9]

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[6] *Thompson v. County of Alameda* (1980) 27 Cal.3d 741, 746; *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.

[7] Code of Civil Procedure section 452; *King v. Central Bank* (1977) 18 Cal.3d 840, 843.

[8] *Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 879.

[9] *Blank v. Kirwan, supra,* 39 Cal.3d at page 318 (emphasis added; citations omitted).

II. THE STATEMENTS IN THE ARTICLE ARE NOT DEFAMATORY.

LOA's cause of action for libel alleges CU's article "was understood by those who saw it and heard it in a way which defamed LOA. Readers of the article were led to understand that LOA produced inferior or substandard products that should not be purchased." CU contends "[i]t is a long-standing legal tenet that where the alleged aspersions reflect primarily on the plaintiff's product, not the plaintiff, there cannot be a claim for corporate defamation. . . ."[10]

A party may defame another by writing or printing a false and unprivileged statement, "which exposes [a] person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation."[11] A publication of this nature constitutes libel. An action for libel or defamation is intended to protect the reputation of the injured party.[12] A corporation "has a business reputation, and language which casts aspersions upon its business character is actionable."[13]

"If [a] statement reflects merely upon the quality of what the plaintiff has to sell or solely on the character of his business, then it is injurious falsehood [also referred to as trade libel] alone. Although it might be possible to imply some accusation of personal incompetence or inefficiency in nearly every imputation directed against a business or a product, the courts have insisted that something more direct than this is required for defamation. On the other hand, if the imputation fairly implied is that the plaintiff is dishonest or lacking in integrity or that he is perpetrating a fraud upon the public by selling something that he knows to

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[10] Emphasis in original.

[11] Civil Code section 45.

[12] *Polygram Records, Inc. v. Superior Court* (1985) 170 Cal.App.3d 543, 549.

[13] *Di Giorgio Fruit Corporation v. AFL-CIO* (1963) 215 Cal.App.2d 560, 571.

be defective, the personal defamation may be found."[14] Interpreting these principles, California courts have concluded "statements simply indicating that plaintiff's business goods 'were of inferior quality,' though conceivably tortious as injurious falsehoods, do not accuse plaintiff of dishonesty, lack of integrity or incompetence nor even imply any reprehensible personal characteristic, and are therefore not defamatory."[15]

In *Isuzu Motors Limited v. Consumers Union of United States, Inc.*, the plaintiffs alleged CU "made a series of false statements about Isuzu and the Isuzu Trooper" in *Consumer Reports* and other publications, including the statement "the 1995-96 Trooper was and is more prone to tip up or roll over than all other SUVs."[16] The federal district court concluded "[n]one of the allegedly defamatory statements set forth in the complaint can be reasonably understood to imply that plaintiff was anything more than negligent in redesigning the Trooper."[17] Applying California law, the court recognized "a charge of ignorance or negligence" is not sufficient to state a claim for defamation.[18] Accordingly, the court dismissed all defamation claims with prejudice which were based on such statements.

Later in its opinion, on the other hand, the *Isuzu Motors* court found the following statement in the publication to be fairly susceptible of a defamatory

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[14] The Restatement Second of Torts, section 623A, comment g, page 341.

[15] *Polygram Records, Inc. v. Superior Court*, *supra*, 170 Cal.App.3d at page 550.

[16] *Isuzu Motors Limited v. Consumers Union of United States, Inc.* (C.D.Cal. 1998) 12 F.Supp.2d 1035, 1039.

[17] *Isuzu Motors Limited v. Consumers Union of United States, Inc.*, *supra*, 12 F.Supp.2d at page 1046.

[18] *Isuzu Motors Limited v. Consumers Union of United States, Inc.*, *supra*, 12 F.Supp.2d at pages 1043-1044, 1046 (citation omitted); Prosser & Keeton, Torts (5th ed. 1984), section 128, page 965 ("[i]t might be possible to imply some accusation of personal inefficiency or incompetence, at least, in nearly every imputation directed against a business or product. The courts have gone to some lengths, however, in refusing to do so, particularly where the most that can be made out of the words is a charge of ignorance or negligence").

meaning because it implied "Isuzu cares more about public image than customer safety": "'If Isuzu's leaders had accepted any of our five invitations to come to our test facility and review our findings in-depth, they would have seen how far off base [Isuzu's consultant]'s conclusions were' said Dr. Pittle. 'Perhaps then they would have directed more effort to protecting their customers than at shielding their public image.'"[19]

"The question whether a statement is defamatory can be reached on a demurrer as a matter of law. [Citations.] If the material complained of is not fairly susceptible of a defamatory meaning, it is proper to dismiss the action."[20]

CU's article comments on the rated life and light output of certain models of lightbulbs from LOA. CU concludes these products, for the most part, do not live up to the claims LOA prints on its product packaging. CU's statements relate to the quality of LOA's product. The article does not cast aspersions on LOA's business character. In fact, it does not comment on LOA's business character at all. The statements at issue are not fairly susceptible of a defamatory meaning. Accordingly, the trial court correctly sustained CU's demurrer to LOA's cause of action for libel without leave to amend.[21]

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[19] *Isuzu Motors Limited v. Consumers Union of United States, Inc.*, *supra*, 12 F.Supp.2d at page 1046.

[20] *Polygram Records, Inc. v. Superior Court*, *supra*, 170 Cal.App.3d at page 551 (citations omitted); *Okun v. Superior Court* (1981) 29 Cal.3d 442, 460.

[21] LOA's reliance on *Di Giorgio Fruit Corporation v. AFL-CIO*, *supra*, is misplaced. In that case, defendants showed a film which "apparently shows that agricultural workers at Di Giorgio farms live in what may be properly described as extremely substandard housing. . . . It is also charged [in the film] that no medical facilities are furnished and that men are required to work 12 hours a day while they are paid for only 11 hours." 215 Cal.App.2d at page 566. A Congressional committee found the charges in the film to be false. The Court of Appeal concluded the film was defamatory because it cast aspersions on the corporation's business character, i.e., its reputation as an employer. 215 Cal.App.2d at pages 566-567, 571. CU's article does not include any statements of this nature about LOA. As set forth above, the article does not even comment on LOA's business character.

III. LOA CANNOT PLEAD THERE ARE ANY FALSE STATEMENTS OF FACT IN CU'S ARTICLE.

LOA also asserts a cause of action for trade libel. Trade libel, also referred to as injurious falsehood, "is defined as an intentional disparagement of the quality of property, which results in pecuniary damage to plaintiff."[22] Section 623A of the Restatement Second of Torts provides: "One who publishes a false statement harmful to the interests of another is subject to liability for pecuniary loss resulting to the other if [¶] (a) he intends for the publication of the statement to result in harm to interests of the other having a pecuniary value, or either recognizes or should recognize that it is likely to do so, and [¶] (b) he knows that the statement is false or acts in reckless disregard of its truth or falsity."[23]

"First Amendment doctrines apply to all causes of action based on the alleged injurious falsehood of a statement, including . . . trade libel."[24] "Statements of opinion, '[h]owever pernicious,' are immunized by the First Amendment in order to ensure that their 'correction [depends] not on the conscience of judges and juries but on the competition of other ideas.'"[25] "A statement of opinion, however, may still be actionable if it implies the allegation of undisclosed [false] facts as the basis for the opinion. [Citations] The dispositive question for the court is whether a reasonable fact finder could conclude that the published statements imply a provably false factual assertion. . . ."[26] Whether a statement is a fact or an opinion is a question of law to be decided by the court.[27]

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[22] *Erlich v. Etner* (1964) 224 Cal.App.2d 69, 73; *Polygram Records, Inc. v. Superior Court*, *supra*, 170 Cal.App.3d at page 548.

[23] The Restatement Second of Torts, section 623A.

[24] *Paradise Hills Associates v. Procel* (1991) 235 Cal.App.3d 1528, 1542.

[25] *Blatty v. New York Times Company* (1986) 42 Cal.3d 1033, 1044, quoting *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 339-340.

[26] *Melaleuca, Inc. v. Clark* (1998) 66 Cal.App.4th 1344, 1353 (internal quotation marks and citations omitted); *Milkovich v. Lorain Journal Company*

LOA fails to allege (or argue on appeal) CU published any false statement of fact. LOA does not dispute (1) CU accurately reported the results of the rated life and light output tests, (2) these are the results anyone would find if conducting the tests in the manner described in the article and (3) based on the results of *these tests*, some of the specific models of LOA lightbulbs did not live up to certain claims printed on the product packaging.

In the article, CU drew conclusions and made recommendations about the lightbulbs based on the testing results. These conclusions and recommendations are CU's opinions. For example, the statement the *Lights of America 2127* was "less pleasing and fairly dim" was based on panelists' reactions when they compared "the lights side by side." Similarly, the statement the *Lights of America 2127* "was more like a 65-watter" than a 100-watt incandescent was based on the panelists' comparison of the compact fluorescent lightbulb with an incandescent bulb.

LOA argues CU's conclusions and recommendations are actionable because they are based on undisclosed "false" facts. LOA alleges CU did not indicate the statement "[a]void bulbs from Lights of America" refers only to the six models of lightbulbs tested and not to LOA's entire product line. Based on our review of the article, it is clear CU's conclusions and recommendations relate only to the six models of LOA lightbulbs tested. Each of CU's comments either refers to a specific model number of an LOA bulb or directs the reader to the table where CU lists the six models and the specific testing results about each. LOA argues the letter from The Home Depot indicates customers read the article as a reflection on LOA's entire product line. This is not a fair reading of the letter. What the letter states is The Home Depot's *opinion* "the entire LOA category" may come into question because CU gave the specific models tested a "not recommended" rating.

(1990) 497 U.S. 1, 20 ("a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection").

[27] *Melaleuca, Inc. v. Clark, supra*, 66 Cal.App.4th at page 1353.

LOA also alleges CU's conclusions and recommendations based on the testing results are actionable because CU "failed to indicate to readers that the testing used in the article was not based on industry standard testing methods, procedures or protocols, nor was testing done in the same manner in which LOA and other manufacturers had used to develop the claims made about their products." As set forth above, LOA concedes "no true industry standard method of testing [rated life] has been universally accepted" and "[t]here is no industry standard for measuring the output of a [sic] incandescent bulb and a compact fluorescent lightbulb for purpose of comparison."[28]

No statement in the article was rendered *false* because CU did not publish results based on the tests LOA wanted CU to use (i.e., the tests most lightbulb manufacturers use). Nowhere in the article did CU claim the results were based on testing methods, procedures or protocols approved by LOA or any other manufacturer. At the hearing on CU's demurrer, LOA told the trial court it could amend its complaint to allege CU knew LRC's testing was funded by LOA's competitors, General Electric and Osram Sylvania. Again, CU's failure to disclose such information does not render any of its conclusions or recommendations false.

LOA fails to state a cause of action for trade libel because it does not allege CU published any false statement about LOA's lightbulbs. The trial court did not abuse its discretion when it sustained CU's demurrer to this cause of action without leave to amend. LOA has demonstrated it cannot amend its complaint to state this (or any other) cause of action against CU.

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[28] LOA alleges, to test rated life, most compact fluorescent lightbulb manufacturers use the ISENA protocol in which the tester leaves a lightbulb on for three hours, turns it off for 20 minutes and repeats this cycle until the bulb burns out. CU's article states one of the five ways in which LRC "life-tested" two models of LOA lightbulbs was "3 hours on, 20 minutes off." LOA fails to mention this.

DISPOSITION

The order sustaining CU's demurrer without leave to amend and dismissing the complaint as to CU is affirmed. Respondent is awarded its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

JOHNSON, Acting P.J.

We concur:

WOODS, J.

PERLUSS, J.